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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE RESPONDENT

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1. *The Treasury's interpretation of "home" as used in Section 23 (a) (1) (A) has received implied congressional approval.*

As we sought to demonstrate in our main brief (pp. 16–21), it is well established that the statutory phrase "while away from home in the pursuit of a trade or business" generally has reference to a temporary business trip away from the taxpayer's post of duty—*i. e.*, the community where the taxpayer is principally assigned to work, and not the community where the taxpayer's residence is located (although usually the two will be the same). Thus, the traveling-expense provision is normally inapplicable to living expenses incurred at the taxpayer's post of duty. See *Com-*

missioner v. *Flowers*, 326 U. S. 465, 474.[1] In this connection, we pointed out (pp. 16–19) that ever since 1921, when the business traveling-expense provision was first enacted, numerous administrative rulings and Tax Court decisions have uniformly supported this interpretation; that all appellate decisions since this Court's decision in *Commissioner* v. *Flowers*, *supra*, have been to the same effect; and that under the circumstances "This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts, is deemed to possess implied legislative approval and to have the force of law." *Commissioner* v. *Flowers*, *supra*, at 469 (footnote omitted).

In answer, taxpayers (Reply Br. 4–6) belatedly rely on the pre-*Flowers* decision in *Wallace* v. *Commissioner*, 144 F. 2d 207 (C. A. 9), holding that one's residence is his tax "home."[2] Taxpayers (Reply Br. 5) concede that "Admittedly the *Wallace* decision has not been frequently followed," but they urge (*id.*, p. 6) that "Truth and right reason can never atrophy though frequently obscured for an unseemly long

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[1] Although not dealing directly with the meaning of "home," this Court there stated: "Travel expenses in pursuit of business within the meaning of Section 23 (a) (1) (A) could arise only when the [employer's] business forced the taxpayer to travel *and to live temporarily at some place other than Mobile* [the taxpayer's post of duty] * * *. Business trips are to be identified in relation to business demands *and the traveler's business headquarters*." (Emphasis added.)

[2] However, under taxpayers' view as to what constitutes "personal" expenditures under Section 24 (a) (1), the deduction claim involved in *Wallace* should have been disallowed, irrespective of the meaning of "home" in Section 23 (a) (1) (A). See taxpayers' main brief, pp. 25–32.

time." According to taxpayers, "the doctrine that 'home is synonymous with post of duty or indefinite post of duty' goes far beyond 'interpretation' of an act of Congress but seeks to erect a rule of law independent of and in conflict with the statutory enactment" (*id.*, p. 11).

Taxpayer's contention is in error for the reasons already stated. Indeed, not only is there no conflict with the statute, but the Treasury's definition of "home" was brought forcefully to the attention of Congress and was given explicit recognition through an amendment relating to a particular group of taxpayers—*i. e.*, members of Congress themselves. Prior to 1952, it was well established that members of Congress could not deduct, as business traveling expenses, the cost of meals and lodging while in Washington; the reason was that Washington is the principal post of duty of a member of Congress and hence, under the settled rule, is his tax "home," even though his family residence is located elsewhere in the district he represents. *George W. Lindsay*, 34 B. T. A 840. This decision was overturned by legislation in 1952 (the year before the tax year involved here), but the amendment was strictly limited to members of Congress and, moreover, to an amount not exceeding $3,000 per year. The amendment provided

> That for the two taxable years beginning after December 31, 1952, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered to be his home for the purposes of

> **Section 23 (a) (1) (A) of the Internal Revenue Code, but amounts expended by such Member within each such taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.**

Legislative Branch Appropriation Act, 66 Stat. 467 (*infra*, p. 9). A like provision was enacted in the Legislative-Judiciary Appropriation Act of 1954 (*infra*, pp. 9–10) and was made permanent in the Internal Revenue Code of 1954 (*infra*, pp. 10–11).

The enactment of this amendment convincingly demonstrates, we believe, congressional acceptance of the Treasury's definition of "home" with respect to all taxpayers except members of Congress. If Congress thought that *Wallace* were correct, it surely would have said so in a statute of general application; instead, it enacted a measure dealing only with members of Congress. And if Congress thought that *Wallace* were correct, there would be no reason at all for the $3,000 annual limitation; for in that event all such costs would be deductible. As the legislative history indicates, a special definition of "home" was thought appropriate for members of Congress because of the unique circumstances involved; but, because of vigorous opposition (especially in the Senate) to establishing a special rule for members of Congress, a restriction was imposed on how much could be deducted as a result of the change.[3]

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[3] The principal proponent of the amendment, Rep. McCormack, recognized the general rule that "home" as used in Section 23 (a) (1) (A) means "a taxpayer's place of business, station, or post of duty, and he is not in a travel status while he is located at his principal post of duty, even though he is

Taxpayers in the instant case seek from this Court a decision advising Congress, in effect, that its 1952 amendment was unnecessary—that indeed the 1952 amendment, because of the $3,000 limitation, actually *reduced* the tax benefits available to members of Congress, rather than increase such benefits as everyone had thought. Taxpayers, moreover, seek a decision conferring across-the-board tax benefits which Congress withheld. In the circumstances, if the *Wallace*

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away from his residence." 98 Cong. Rec. 5280. He argued, though, that the residence of a Member of Congress in the district he represents should be regarded as his tax "home" so as to place him on a par with a businessman who makes a business trip to Washington from his business headquarters located elsewhere. 98 Cong. Rec. 5280–5281. See also 98 Cong. Rec. 8276 (Senator Ellender). The proposal, after passage by the House, was approved by the Senate Appropriations Committee, but with a proviso limiting the deduction to $2,400 per year. Sen. Rep. No. 1828, 82d Cong., 2d Sess., p. 2. Even with this limitation, however, the proposal was widely criticized on the Senate floor as a measure granting Members of Congress a tax advantage not enjoyed by other taxpayers. 98 Cong. Rec. 8271–8292. See, *e. g.*, the statement of Senator Williams, 98 Cong. Rec. 8281 ("I think we should let Congressmen pay their expenses as other men do. When the Senator and I ran for office we knew that if elected we were coming to Washington"), and the statement of Senator Byrd, 98 Cong. Rec. 8282 ("Thus, at the present time, there is a uniform rule which applies for deducting traveling expenses, including expenses for meals and lodging, under section 23 (a) (1) (A) while away from home and in pursuit of a trade or business. The expense must be incurred away from the principal post of duty of the taxpayer. The McCormack amendment would reverse this uniform rule in the case of a Member of Congress.") The proposal was defeated in the Senate, 98 Cong. Rec. 8292, by the device of adopting a substitute measure on a wholly different subject. In conference, however, a compromise measure was adopted, restricting the effect of the provision to the two tax years beginning after December 31, 1952, but changing the dollar limitation to $3,000 per year. 98 Cong. Rec. 9555–9563.

definition of "home" is to be applied generally, that step, we submit, should be taken by Congress, not this Court.

2. *Taxpayers' expenses at Kinston, their only post of duty during the period involved, are not deductible apart from the Tax Court's exception as to temporary employment of short duration, and taxpayers have failed to bring themselves within the exception.*

As pointed out in our main brief (pp. 21–26), the Tax Court has engrafted on the general rule an exception relating to temporary employment of short duration. Where the exception applies, the taxpayer's temporary post of duty is disregarded and the taxpayer's residence is apparently treated as the tax "home." In order to come within the exception, however, it is necessary for the taxpayer to prove that the duration of the job not only was actually short but also was foreseeably short. The central issue in this case is whether taxpayers carried their burden of showing that their jobs at Kinston met these conditions.

In these circumstances, it is surprising, to say the least, that taxpayers repeatedly attack the validity of the exception. After citing the three basic standards of deductibility as stated in *Flowers,* taxpayers contend that "there can be no exceptions to the mandate of this Court if the matter in issue is within the orbit of its decision" (Reply Br. 4); that the conditions of deductibility under the exception "erect additional and entirely different standards of deductibility from those established by this Court" (*id.,* p. 19); and that the position of the Tax Court and the Commissioner "erroneously assumes the validity of a set of legal

requirements in addition to those specifically established by this Court" (*ibid.*).

But this contention is self-defeating. The exception in question operates *in favor* of these taxpayers and those similarly situated. The exception is ameliorative in nature and serves to extend the benefit of the deduction to those who would otherwise not qualify. Apart from the exception, it is clear that the Tax Court would have flatly rejected taxpayers' deduction claim; for, apart from the exception, taxpayers would fail to meet the three requirements stated in *Flowers*. As shown above, while at Kinston, they were not "away from home" within the generally accepted definition of "home." In addition, even assuming that their expenses at Kinston could fairly be regarded as "traveling" expenses, these expenses were not incurred while "in the pursuit of a trade or business" within the meaning of *Flowers*.[4]

Thus, by attacking the validity of the exception, taxpayers attack the very basis on which the Commissioner and the Tax Court allow construction

[4] 326 U. S. at 474: "Travel expenses in pursuit of business within the meaning of § 23 (a) (1) (A) could arise only when the railroad's [*i. e.*, employer's] business forced the taxpayer to travel and to live temporarily at some place other than Mobile [Flowers' post of duty], thereby advancing the interests of the railroad [employer]." When each of the taxpayers in the instant case traveled to Kinston, he was unemployed and was not sure of obtaining a job there; under usual standards, therefore, the travel was not "in the pursuit of a trade or business" (Section 23 (a) (1) (A)) or "in connection with the performance by him of services as an employee" (Section 22 (n) (2)). Compare *United States* v. *Woodall* (C. A. 10), decided May 6, 1958 (1958 C. C. H., par. 9547), certiorari denied, October 13, 1958, No. 159, this Term. See pp. 14–15, n. 2, of our main brief.

workers (and others) a deduction for "traveling expenses" incurred on jobs shown to meet the requirements of "temporary" employment.[5] In effect, these taxpayers want the benefit of the exception without meeting its conditions. And, by arguing that shortness of duration is immaterial to deductibility, taxpayers necessarily take the position that they are entitled to deduct their everyday living expenses even when they are on a job lasting for "several years" (Br. 22). Such preferential tax treatment, we submit, cannot be justified under Section 23 (a) (1) (A) as a deduction for "traveling expenses," particularly in the light of Section 24 (a) (1)'s prohibition against the deduction of 'personal, living, or family expenses."[6] See *Commissioner* v. *Flowers,* 326 U. S. at 469.

For these reasons, and for the reasons stated in our main brief, it is respectfully submitted that the judgment of the court below should be affirmed.

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[5] For example, in this very proceeding (R. 27), taxpayer Stines was allowed to deduct his expenses in connection with his 1953 employment at Charleston (3 weeks) and Fort Bragg (7½ weeks).

[6] As pointed out in our main brief (p. 24, n. 17), not even truly transient workers are permitted to deduct their living expenses while traveling. See, *e. g., Brassfield* v. *Commissioner,* 1952 P-H T. C. Memo. Dec., ¶ 52, 176, 52, 177.

APPENDIX

1. The Legislative Branch Appropriation Act, 1953, Pub. L. 471, 82d Cong., 2d Sess., July 9, 1952, provides in pertinent part (66 Stat. 464, 467):

HOUSE OF REPRESENTATIVES

SALARIES, MILEAGE, AND EXPENSES OF MEMBERS

For compensation of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, $5,492,500.

For mileage and expense allowance of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, as authorized by law, $1,273,500: *Provided*, That for the two taxable years beginning after December 31, 1952, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered to be his home for the purposes of section 23 (a) (1) (A) of the Internal Revenue Code, but amounts expended by such Member within each such taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

2. The Legislative-Judiciary Appropriation Act, 1954, Pub. L. 178, 83d Cong., 1st Sess., August 1, 1953, provides in pertinent part (67 Stat. 318, 322):

HOUSE OF REPRESENTATIVES

SALARIES, MILEAGE, AND EXPENSES OF MEMBERS

For compensation of Members of the House of Representatives, Delegates from Territories,

and the Resident Commissioner from Puerto Rico, $5,492,500.

For mileage and expense allowance of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, as authorized by law, $1,273,500. The proviso under this head in Public Law 471, Eighty-second Congress, is amended to read as follows: "*Provided*, That in the case of taxable years beginning after December 31, 1953, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home for the purposes of section 23 (a) (1) (A) of the Internal Revenue Code, but amounts expended by such Member within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

3. Section 162 (a) of the Internal Revenue Code of 1954 provides:

§ 162. TRADE OR BUSINESS EXPENSES

(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not

taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

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